Supreme Court, U. S.
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In The

Supreme Court of the United States

May Term 1979

No. 78-1643

JOSEPH MARCERA and JOHN DILLMAN, Individually and on behalf of all others similarly situated,

Respondents,

—*vs*—

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction,

Respondents,

and

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Petitioner,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Joseph Marcera and John Dillman submit this brief in opposition to petitioner's request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 27, 1979.

Opinions Below

On February 27, 1979, the United States Court of Appeals for the Second Circuit entered a judgment and order with opinion vacating a decision of the United States District Court for the Western District of New York and remanded this case with directions to certify both Plaintiff and Defendant classes and grant classwide preliminary relief. The judgment of the Second Circuit is annexed to the Petition as Appendix C.

The judgment of the Second Circuit was amended by an Order of the Court dated March 28, 1979 amending the mandate. This Order is annexed to the Petition as Appendix D. The judgment of the Second Circuit was further corrected by the Clerk of the Court which is annexed to this Brief in Opposition as Appendix A.

The opinion of the United States District Court for the Western District of New York entered the 5th day of June, 1978, has not been reported. The Opinion is annexed to the Petition as Appendix B.

Questions Presented

Whether pretrial detainees who are presumably innocent individuals must be confined in a constitutionally humane manner allowing contact visitation with family and friends?

Whether the court below properly reviewed a denial of class certifications and preliminary relief when their denial was grounded in an erroneous interpretation of the substantive law and the Second Circuit was compelled to protect its mandate issued on a prior appeal?

Reasons for Denying the Petition

I.

The right to contact visitation for pretrial detainees is so firmly established in the Second Circuit and so many facilities have implemented contact visits without difficulty, that a reversal of the judgment would create chaos and confusion in the law.

Since 1974, the Second Circuit Court of Appeals has repeatedly held that pretrial detainees must be permitted "contact visits." *Rhem v. Malcolm ("Rhem I")*, 371 F. Supp. 594, 626 (S.D.N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974). Accord, *Marcera v. Chinlund*, 78-2081, slip op. 1466-67 (2d Cir. Feb. 27, 1979), *Wolfish v. Levi*, 573 F.2d 118, 126 fn. 16 (2d Cir.), *cert. granted*, 99 S.Ct. 76 (1978) (No. 77-1829)*; *Rhem v. Malcolm ("Rhem II")* 527 F.2d 1041, 1043 (2d Cir. 1975). Many other courts in New York have required contact visits. See eg. *Merriweather v. Sherwood*, No. C.A. 77-3421 (E.W.), consent judgment at 36-39 (S.D.N.Y. Oct. 27, 1978); *Forts v. Malcolm*, 426 F.Supp. 464 (S.D.N.Y. 1977); *Detainees of the Brooklyn House of Detention v. Malcolm*, 421 F.Supp. 832 (S.D.N.Y. 1976); *Ambrose v. Malcolm*, 440 F.Supp. 51 (S.D.N.Y. 1976); *Manicone v. Cleary*, Civ. No. 74-575 (E.D.N.Y. June 30, 1975). See also, *Cooper v. Lombard*, 64 A.D.2d 130, 135-136 (4th Dept. 1978). These decisions, in part, cover the largest facilities in New York State which are within New York City. "In sum, it is too late in the day to suggest it does not offend the Constitution not to permit contact visits." *Marcera*, slip op. at 1473.

Recognizing this body of case law the New York Commission of Correction has instructed the county sheriffs of New York that

> "Many courts, including the Second Circuit Court of Appeals, whose jurisdiction includes New York State,

*Note: Since this pretrial detainee case is now before the Supreme Court, it should not be necessary to take a second case immediately.

> have held, after hearing testimony from all concerned (e.g., administrators, corrections experts and prisoners) that contact visitation is a minimal constitutional requirement in local correctional facilities. (See *Rhem* ...) Contact visitation is now permitted in many jurisdictions including the New York State prison system, the Federal Prison system and various local facilities in New York State."

(Joint Appendix to Second Circuit, p. 14). In fact, sheriffs in fourteen counties in New York in addition to New York City already have contact visitation for pre-trial detainees.*

No final relief was directed by the Second Circuit in this case. *Marcera*, slip op. at 1480. The court merely reaffirmed that pretrial detainees enjoy a constitutional right to contact visits. The trial court has been directed to consider security and cost factors in reviewing the plans for implementing contact visits. *id.* By leaving the development of these plans to each individual county sheriff, the court has avoided becoming "enmeshed in the minutiae of day-to-day prison administration." *Marcera*, slip. op. at 1479 and cases cited therein.

This case is limited in effect to the State of New York where the implementation of contact visitation is so advanced that it no longer presents a novel or important issue. Reversal of the Second Circuit decision would leave the right to contact visits predicated on the fortuity of being detained in the "right" county. The petition should be denied to avoid the inevitable chaos and confusion in the law that would result.

*Note: *Marcera v. Chinlund*, 76 Civ.-508, unreported decision at p. 7 (W.D.N.Y. June 6, 1978), vacated and remanded, *Marcera, supra.*

II.

The right to contact visitation has developed such a universal acceptance that any other decision by the Second Circuit would have defied commonly accepted norms of decency and humane treatment of pretrial detainees.

The Second Circuit does not stand alone in its repeated declarations that contact visitation is a minimal constitutional right enjoyed by pretrial detainees. Such visitation is rapidly becoming the universally accepted norm across the nation. See eg.: *Wesson v. Johnson*, 579 P.2d 1165 (Colo. 1978); *Miller v. Carson*, 563 F.2d 741, 748-749 (and cases cited therein) (5th Cir. 1977); *Jordan v. Wolke*, 460 F.Supp. 1080, 83-85 (E.D.W. 1978); *Cooper v. Lombard, supra*, and cases cited therein, pp. 135-136. The only federal appellate decision to the contrary is *Feeley v. Sampson*, 570 F.2d 364 (1st Cir. 1978). But see *Dimarzo v. Cahill*, 575 F.2d 15, 20 (1st Cir.), cert. denied *sub nom, Hall v. Dimarzo*, ____U.S.____, 99 S.Ct. 312 (1978).

Nationally respected organizations have equally recommended contact visitation as a minimal standard: American Correctional Association. *Response of the American Correctional Association to Correctional Standards*, Standards 4.8, 2.17 (1976); American Correctional Association, *Model Correctional Rules and Regulations* pp. 31-34 (1977); Board of Correction, *Minimum Standards for New York City Correctional Facilities*, §10.6 (1978); Department of Justice, proposed rule making for *Control, Custody, Care, Treatment and Instruction of Inmates*, 28 C.F.R. §540.41, 42 Fed. Reg. 26338 (1977); Department of Justice, *Draft Federal Standards for Corrections* pp. 63-65 (1978); American Correctional Association, *Manual of Standards for Adult Local Detention Facilities*, §5316 (1977); National Sheriffs Association, *Inmates Legal Rights*, p. 42 (1974).

Dr. Karl Menniger, an expert in prison conditions has stated that he:

> ". . . deplored non-contact visits as 'the most unpleasant and most disturbing detail in the whole prison,' and described them as a 'violation of ordinary principles of humanity.' "

Rhem v. Malcolm, 371 F.Supp. 592, 602 (S.D.N.Y. 1974) aff'd *Rhem* (I), *supra*. Thus the decision of the Second Circuit certainly has reached the right result in this case and should be sustained.

III.

The denial of class certification was properly reviewed by the Second Circuit since both the denial was grounded on an erroneous application of the substantive law and its review was ancillary to the appeal from the preliminary injunction.

The Second Circuit properly reviewed the denial of the requested class certification under two distinct theories. The first is that denial of class certification may be properly reviewed if it was based on a consideration of the legal sufficiency of the merits. The second is when an appellate court is reviewing an appealable interlocutory order, such as denial of preliminary relief, all parts of the order, including those not usually appealable, may be reviewed by the court.

This court has implied that an order denying class certification which passes "on the legal sufficiency of any claims for injunctive relief" as affects the merits of plaintiff's claim may be appealable. *Gardner v. Westinghouse Broadcasting Co.*, ____U.S.____ 98 S.Ct. 2451, 2453 (1978). Thus it appears that the test set forth in *Williams v. Wallace Silversmiths Inc.*, 566 F.2d 364, 367 (2d Cir. 1977) for assessing the appealability of an order denying class certification retains its viability. The established criteria were satisfied here: (1) preliminary relief was requested and such relief is the heart of the case; (2) the striking of class allegations was based on a view of the merits of plaintiffs' case; and (3) the scope of the ultimate relief was contracted to the

extent of effectively "denying" the relief sought by plaintiffs. The court below specifically found the ". . . district judge [had] misconceived both the nature of the constitutional issues and the appropriate procedural response . . ." *Marcera*, at 1470.

The Second Circuit also had an independent ground for review of the class order as it had repeatedly held that when properly reviewing a denial of preliminary relief, it could exercise pendent jurisdiction over a denial of class certification. *Marcera* at 1470, fn. 8. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.* 538 F.2d 164 (7th Cir. 1976), cert. denied., 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed. 2d 598. This question has not been conclusively determined by this court. See, *Gardner, supra* 98 S.Ct. at 2453, fn. 3. This simultaneous review surely promoted judicial efficiency and economy and in this case equally served to protect a previously issued mandate of the court which had once before reversed a denial of preliminary relief and class certification by the district judge. *Marcera, supra* at 1470, fn. 8, citing *Marcera v. Chinlund*, 565 F.2d 253 (2d Cir. 1977) (*per curiam*). Accordingly, the Second Circuit properly entertained the appeal of the class aspects of the district court order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate in these circumstances. Contact visitation is so widely established in New York that it is no longer a novel or important issue warranting this Court's consideration. Furthermore, the decision of the Second Circuit is in full conformity with accepted norms of humanity and decency. Finally, the Second Circuit properly reviewed the denial of class certification on two independent viable theories of jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: Rochester, New York
May 7, 1979

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York 10007,

A. Daniel Fusaro
Clerk

Marcera v. Chinlund — August Term 1978
Docket Nos. 78-2081, et al — Decided February 27, 1979

Page 1489, 5 lines up from bottom of page — delete "relief under" and insert "relief so that the certification order may be reviewed under" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd